Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1370

In The
Supreme Court of the United States
October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Did the Arkansas Supreme Court err in finding that a state statute exempting sales of newspapers and certain magazines from a general sales tax, while sales of appellant's magazine are taxed, does not violate the First Amendment rights of the appellant?* **

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* The parties to the proceeding in the Arkansas Supreme Court were Arkansas Writers' Project, Inc. appellant herein, and Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, appellee herein.

**Designation of Corporate Relationships:

In addition to the corporate relationships designated in the Jurisdictional Statement, the appellant, Arkansas Writers' Project, Inc., has a wholly-owned subsidiary, Southern Writers' Project, Inc., an Arkansas corporation, which is a general partner in Southern Magazine Limited Partnership, an Arkansas limited partnership. This is its Second Designation of Corporate Relationships.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	
I. A STATE TAXING STRUCTURE WHICH BURDENS FIRST AMENDMENT RIGHTS IS SUBJECT TO STRICT SCRUTINY	9
II. THE APPELLEE'S DENIAL OF A TAX EXEMPTION TO APPELLANT WHICH IS AVAILABLE TO PUBLISHERS OF RELIGIOUS, PROFESSIONAL, TRADE AND SPORTS PUBLICATIONS VIOLATES THE FIRST AMENDMENT	12
A. THERE IS NO RATIONAL BASIS FOR, LET ALONE A COMPELLING INTEREST IN, DENYING A TAX EXEMPTION TO SALES OF A GENERAL INTEREST MAGAZINE WHICH IS AVAILABLE TO RELIGIOUS, PROFESSIONAL, TRADE AND SPORTS PUBLICATIONS	12
B. DISCRIMINATION UNDER THE "MAGAZINE EXEMPTION" VIOLATES THE FIRST AMENDMENT	14
III. THE APPELLEE'S DENIAL OF A TAX EXEMPTION TO APPELLANT WHICH IS AVAILABLE TO PUBLISHERS OF NEWSPAPERS VIOLATES THE FIRST AMENDMENT	20

TABLE OF CONTENTS—Continued

	Page
A. INTRODUCTION; NEED FOR RULING ON "NEWSPAPER" EXEMPTION	20
B. THERE IS NO MEANINGFUL DISTINCTION BETWEEN NEWSPAPERS AND MAGAZINES, AND THUS NO RATIONAL BASIS FOR DISCRIMINATING BETWEEN THEM	21
C. THE DEFINITION OF "NEWSPAPER" UTILIZED BY THE APPELLEE IS UNCONSTITUTIONALLY VAGUE, AND IS BASED PRIMARILY ON CONTENT, WHICH VIOLATES THE FIRST AMENDMENT	22
D. THE SELECTION OF NEWSPAPERS AND NOT MAGAZINES FOR A TAX EXEMPTION TARGETS CERTAIN PUBLICATIONS WITHIN THE PRESS FOR DISCRIMINATORY TAXATION IN VIOLATION OF THE FIRST AMENDMENT	25
IV. THE STATE COURT SHOULD EXERCISE JURISDICTION OVER CLAIMS UNDER 42 U.S.C. § 1983	29
CONCLUSION	35

TABLE OF AUTHORITIES

Page

CASES

Carey v. Brown, 447 U.S. 455 (1980) 8, 11, 18

Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969) 31

Dowd Box v. Courtney, 368 U.S. 502 (1962) 30

Gitlow v. New York, 268 U.S. 652 (1927) 9

Grosjean v. American Press Co., 297 U.S. 233 (1936) 6, 9, 13, 27

Kish v. Wright, 562 P.2d 625 (Utah 1977) 30, 32

Maine v. Thiboutot, 448 U.S. 1 (1980) 33

Martinez v. California, 444 U.S. 277 (1980) 31

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1986) 11

Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 18

Minneapolis Star and Tribune Co v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 5, 6, 8, 11, 13, 26, 27, 28

Near v. Minnesota, 283 U.S. 697 (1931) 9

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 34

New York Times Company v. Sullivan, 376 U.S. 254 (1964) 17

Police Department of Chicago v. Mosely, 408 U.S. 92 (1972) 8, 16, 17, 18

Ramirez v. County of Hudson, 169 N. J. Super. 455, 404 A.2d 1271 (1979) 33, 34

Regan v. Time, Inc., 468 U.S. 641 (1984) 8, 15, 22, 23, 28

Speiser v. Randall, 357 U.S. 513 (1958) 9, 10

Sumner v. Mata, 449 U.S. 539 (1981) 32

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Amendment I ..... *passim*

United States Constitutional Amendment XIV, Section 1 ..... 2, 9, 12, 34

28 U.S.C. Section 1341 33

28 U.S.C. Section 1343 30

42 U.S.C. Section 1983 ..... *passim*

42 U.S.C. Section 1988 ..... 33, 34

Ark. Stat. Ann. § 84-1903 3

Ark. Stat. Ann. § 84-1904(f) 3, 8, 20

Ark. Stat. Ann. § 84-1904(j) 3, 8

MISCELLANEOUS

Websters Third New International Dictionary, Merriam-Webster (1979) 23

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BRIEF FOR APPELLANT

OPINIONS BELOW

On March 9, 1984, the Arkansas Commissioner of Revenues denied the appellant's claim for tax refund [J.S. 12]. The opinion of March 29, 1985, and the Order of April 15, 1985 of the Chancery Court of Pulaski County,

Arkansas, are set out in the appendix to the Jurisdictional Statement. [J.S. 14-18]. The opinion of the Arkansas Supreme Court entered October 14, 1985, and the supplementary opinion on rehearing entered November 18, 1985 appear in the appendix to the Jurisdictional Statement [J.S. 11-12] and are each reported as *Ragland, Commissioner v. Arkansas Writers' Project, Inc.*, 697 S.W. 2d 94 (1985) and 698 S.W. 2d 802 (1985), respectively.

—o—

JURISDICTION

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of Arkansas on appeal is conferred by 28 U.S.C. Section 1257(2). Probable jurisdiction was noted on March 19, 1986.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Ark. Stat. Ann. § 84-1903, The Arkansas Gross Receipt Act of 1941, provides:

> There is hereby levied an excise tax of three per centum (3%) upon the gross proceeds or gross receipts derived from all sales to any person . . . of the following: (a) Tangible personal property.

Ark. Stat. Ann. § 84-1904 exempts from the Gross Receipts Tax (Sales Tax) imposed (by Ark. Stat. Ann. §84-1903) on all sales of tangible personal property, numerous items, including:

> . . . (f) Gross receipts or gross proceeds derived from the sale of newspapers . . .
>
> (j) . . . religious, professional, trade and sports journals and/or publications published and printed within this state . . . when sold through regular subscriptions.

Ark. Const., Art. 1, § 6 provides in part:

> The liberty of the press shall ever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for abuse of such right.

Ark. Const., Art. 2, § 13 provides:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws.

42 U.S.C. § 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

This is an appeal from a decision of the Arkansas Supreme Court denying appellant's claim for a refund of, and declaratory judgment with respect to, sales taxes assessed on sales of appellant's magazine, *Arkansas Times Magazine*. The appellant claimed that, because sales of other publications are exempt from the Arkansas Gross Receipts Tax under two exemptions, it is also entitled to an exemption. One exemption exempts newspapers, and the other exemption exempts religious, professional, trade and sports journals when sold through regular subscriptions.

The appellant, Arkansas Writers' Project, Inc., an Arkansas corporation, publishes *Arkansas Times Magazine,* a general interest monthly magazine with circulation of approximately 25,000. Under the Arkansas Supreme Court's ruling, appellant must pay sales tax on sales of *Arkansas Times,* even though sales of newspapers and religious, professional trade and sports magazines are exempt from tax.

Arkansas Times publishes many articles of the same type published by those publications which are exempted from the general sales tax. In addition, there are numerous other similarities such as the distribution of the publications by subscription sales, vending machine sales and retail store sales, the method of production, and the frequency in publication. *Arkansas Times* competes with the publications exempted from sales tax for the same advertising dollars, and bears the same costs such as the rates for postage. Yet appellant is required to pay the sales tax which other similar publications are not required to pay.

This litigation commenced in 1980 when the Arkansas Commissioner of Revenue, the appellee herein, performed a sales tax audit on appellant. Appellant contested the assessment through the administrative process, including a court appeal. Appellant and appellee settled the case in September, 1982, and appellant agreed to pay sales tax, subject to a right to raise the issue again if there were a change in the law or a court ruling bringing into question the validity of the tax exemption structure.

In 1983, this Court ruled in *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983) that a Minnesota use tax on paper and ink used in the production of periodical publications which exempted the first $100,000 annually for paper and ink was unconstitutional. Following this decision, on January 20, 1984, appellant, in accordance with proper administrative procedure, brought a claim for refund of taxes paid after October, 1982. It claimed (1) that the "magazine exemption" should be construed to exempt sales of

Arkansas Times; and (2) that taxation of sales of *Arkansas Times* when sales of newspaper and other magazines were exempt from tax violated appellant's first Amendment rights. Appellee, acting within his jurisdiction, denied the claim for refund. Appellant pursued a proper appeal to the Pulaski Chancery Court, adding a civil claim for damages under the Civil Rights Act of 1964, 42 U.S.C. § 1983. The Chancery Court interpreted the "magazine exemption" to include all sales of *Arkansas Times,* and thus did not reach the constitutional issues. Appellee appealed to the Arkansas Supreme Court, which held in its opinion of October 14, 1985 that the Chancery Court had erred in its construction of the magazine exemption, and that the "magazine exemption" did not exempt sales of *Arkansas Times,* but applied only to religious, sports, professional and trade journals. The Arkansas Supreme Court did not, however, consider the constitutional issues which had been continually raised. On petition for rehearing, the Arkansas Supreme Court issued a supplementary opinion on November 18, 1985, considering the constitutional issues and finding that the application of the sales tax to *Arkansas Times* was constitutional, in spite of the fact that sales of newspapers and other magazines were exempt from sales tax.

In discussing appellant's argument that the imposition of tax on sales of *Arkansas Times,* while sales of newspapers and other magazines were exempt from taxation, infringed upon appellant's freedom of speech and of the press, the Arkansas Supreme Court distinguished the *Minneapolis Star* case and another case relied upon by appellant, *Grosjean v. American Press Company,* 297 U.S. 233, (1936), on the basis that the tax in each case was a

special tax applicable only to newspapers, while the tax in issue in this case is a general sales tax applicable to sales of all items not specifically exempt. The Arkansas Supreme Court considered the tax in this case to be an "ordinary form of taxation" for support of the government from which publications are not immune. The court also stated that, since *Arkansas Times* is not exempt from tax, it does not matter to appellant whether the exemption from taxation of other publications is valid or invalid. Since the Arkansas Supreme Court found that appellant's civil rights had not been violated, it did not consider appellant's 42 U.S.C. § 1983 claim.

SUMMARY OF ARGUMENT

The appellant claims that its First Amendment rights to freedom of speech and the press have been violated by the appellee and that it is entitled to a civil remedy under 42 U.S.C. § 1983. The appellee has imposed a sales tax on sales of appellant's magazine, *Arkansas Times Magazine,* while exempting newspapers and religious, professional, trade and sports publications from taxation. Part I below contains a discussion of the standard of review of state regulatory measures which burden First Amendment rights. Two exemptions from the Arkansas sales tax are at issue, and the effect of these exemptions are discussed at Part II and Part III below. The state court's duty to take jurisdiction over appellant's 42 U.S.C. § 1983 claim is discussed at Part IV.

Part II discusses the effect of what is referred to herein as the "magazine exemption," which appears at *Ark. Stat. Ann.* § 84-1904(j), specifically exempting from the Arkansas sales tax gross proceeds derived from sales of "religious, professional, trade and sports journals and/or publications printed and published within this State, . . . when sold through regular subscriptions." Section B of Part II discusses the invalidity under the First Amendment of a discrimination between publications or speech based on content, relying on *Regan v. Time, Inc.*, 468 U.S. 641 (1984), *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

Part III discusses the effect of what is referred to herein as the "newspaper exemption," which appears at *Ark. Stat. Ann.* § 84-1904(f), specifically exempting from the Arkansas sales tax "gross receipts or gross proceeds derived from the sale of newspapers."

Section A of Part III discusses the need for a ruling on the validity of the discrimination between newspapers and magazines; Section B discusses the lack of a rational basis for the discrimination; Section C discusses the vagueness of the definition of "newspaper;" and Section D deals with the targeting of particular publications for taxation in violation of the First Amendment, relying on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983).

ARGUMENT

I. A STATE TAXING STRUCTURE WHICH BURDENS FIRST AMENDMENT RIGHTS IS SUBJECT TO STRICT SCRUTINY.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." The First Amendment is made applicable to the States by the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1927). These constitutional guaranties are not limited to the dissemination of information and opinion free of charge, but extend equally to commercial sales of literature. *Near v. Minnesota*, 283 U.S. 697 (1931). The appellant is entitled to the First Amendment protections against the abridgement of its freedom of speech and press which results when it is denied tax exemptions which are granted to other publications.

It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The appellant's speech was limited by the appellee's withholding of a tax exemption. This is a penalty, exactly the same as a fine imposed for engaging in speech.

Speiser v. Randall, 357 U.S. 513 (1958), dealt with a provision of the California Constitution which required persons claiming a tax exemption to sign a loyalty oath stating they did not advocate the unlawful overthrow of the government. The Court, with only one dissent, found the statute to be an unconstitutional abridgment of freedom of speech. The Court commenced its opinion by stat-

ing: "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." 357 U.S. at 518.

The Court rejected the argument that a tax exemption was a "privilege" or "bounty" which could be granted or withheld at the whim of the taxing power, stating: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." 357 U.S. at 518.

The test to be applied to statutes abridging speech is set forth by the Court as follows:

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

357 U.S. at 520.

The Court, without deciding whether California could deny a tax exemption to persons who engaged in unlawful speech, found the denial of an exemption to be unconstitutional because the taxpayer had the burden of proving that no unlawful speech had occurred, rather than the State having an obligation to prove that unlawful speech had occurred. After analyzing at length the particular facts of the case, the Court concluded:

> . . . [W]hen the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the State comes forward with sufficient proof to

> justify its inhibition. The State clearly has no such *compelling interest* at stake . . . (Emphasis added).

357 U.S. at 529.

The standard which the Court applies when legislation burdens a fundamental right such as freedom of speech and press is the "strict scrutiny" standard. Under the strict scrutiny standard the Court carefully scrutinizes the underlying factual basis of the legislation to determine whether the law is necessary to promote a compelling or overriding interest of government.

In his dissenting opinion in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 at 599-600 (1983), Justice Rehnquist stated the basis for governmentally created classifications:

> [A]ll governmentally created classifications must have some 'rational basis' . . .
>
> • •
>
> Where the State devises classifications that infringe on the fundamental guarantees protected by the Constitution the Court has demanded more of the State in justifying its action. But there is no *infringement*, and thus the Court has never required more, unless the State's classifications *significantly burden* these specially protected rights. As we said in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L.Ed. 2d 520, 96 S.Ct. 2562 (1976) (per curiam) (emphasis added), 'equal protection analysis requires strict scrutiny of a legislative classification only when the classification *impermissibly interferes* with the exercise of a fundamental right . . . ' . . . (Emphasis is the author's)

And in *Carey v. Brown*, 447 U.S. 455 (1980), the facts of which are described at II.B. below, the Court stated that

"When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." 447 U.S. at 461-462.

As discussed more specifically below, strict scrutiny would be applied to the legislative classification in this case, since the imposition of a sales tax on sales of *Arkansas Times* significantly burdens, and thus impermissibly interferes with, appellant's First Amendment rights when other publications are exempt from taxation.

II. THE APPELLEE'S DENIAL OF A TAX EXEMPTION TO APPELLANT WHICH IS AVAILABLE TO PUBLISHERS OF RELIGIOUS, PROFESSIONAL, TRADE AND SPORTS PUBLICATIONS VIOLATES THE FIRST AMENDMENT.

A. There is No Rational Basis For, Let Alone a Compelling Interest in, Denying a Tax Exemption to Sales of a General Interest Magazine Which is Available to Religious, Professional, Trade and Sports Publications.

The appellee has not asserted any compelling interest of government that overrides appellant's fundamental right to freedom of speech and press and protection from discrimination in the exercise of those rights. The factors provided by the appellee as justifications for denying the exemption to sales of *Arkansas Times* would not even satisfy the rational basis test.

The appellee stated in his lower court brief three justifications for discriminating between exempted publications—religious, professional, trade and sports publications —and all other publications.

The first justification asserted by appellee is that the exempted publications are of interest to only a small segment of the population and are not sold in vending boxes or at retail locations, and depend almost exclusively upon subscription sales. However, there is no evidence in the record to support this contention. Even if there were evidence to support this contention, a tax that singles out individual publications within the press places a heavy burden on the State to justify its action. *Minneapolis Star and Tribune Co. v. Minnesota Comm'r. of Revenue,* 460 U.S. 575 (1983). The fact that a publication appeals to a small group rather than the general public is not a reasonable, let alone compelling justification.

The second justification given by the appellee is that the four types of exempt publications have little incentive or opportunity to expand their circulation outside their area of interest. As with the first justification described above, the fact that a publication has limited circulation is not a rational reason for treating it differently than a publication with broader circulation. In fact, the application of a tax only to publications with a large circulation was held to be unconstitutional in *Grosjean v. American Press Company,* 297 U.S. 233 (1936), and the application of a tax only to large publications was held to be unconstitutional in *Minneapolis Star, supra.* Furthermore, to the extent that this justification is based on the limited content of the publication, it is unconstitutional under the First Amendment, as discussed in Section B below.

The final justification given by appellee is that publishers of religious, professional, trade and sports jour-

nals in most cases would be publishing the magazine as a service to its readership rather than as a revenue producer. The statute, however, does not limit the exemption to nonprofit magazines. There is no evidence in the record that religious, professional, trade and sports journals are usually published as a service to their readership and not for profit, and the appellee's contention to that effect is probably incorrect. Particularly in the case of a sports or trade magazine, the publisher is likely to be publishing the magazine as a business venture. All publications, whether or not they are published for profit, provide a service to their readership. *Arkansas Times* provides a service to its readership by providing useful articles of interest on various topics in the same manner a trade or sports journal would provide service to its readership. There is no rational basis for determining that the exempted publications provide a service to their readership while others do not.

The appellee has not even attempted to assert a compelling state interest in the discrimination, and, since there is not even a rational basis for discriminating, the appellee is entitled to the same tax exemption available to other magazines.

B. Discrimination Under the "Magazine Exemption" Violates the First Amendment.

The state has the power to control speech in a public forum through reasonable time, place, and manner restrictions. However, any restrictions must be implemented without regard to the content of the speech; they must serve a significant governmental interest; and they must leave open ample alternative channels for communication

of the information. *Regan v. Time, Inc.* 468 U.S. 641 (1984). The denial of a tax exemption to appellant which is available to other publications which have specified content is unconstitutional.

In *Regan v. Time, Inc.*, 468 U.S. 641 (1984) portions of a federal statute which discriminated between publications based on the content, or purpose, of the publication were declared unconstitutional. The statute, 18 U.S.C. § 474, made it a crime to photograph the currency of the United States. Certain exceptions to the rule appeared in 18 U.S.C. § 504 for illustrations of "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers or albums" as long as the illustrations were black and white, less than three-fourths or more than one and one-half times the size of the original, and the negatives and plates used in making the illustrations were destroyed after their final use. Time, Inc. was advised by Secret Service agents that particular photographic reproductions of currency appearing in its magazine violated Section 474 since they did not comply with the exceptions contained in Section 504. Time continued to use such reproductions. An issue of Sports Illustrated carried a photographic color reproduction of $100 bills pouring into a basketball hoop. A Secret Service agent informed Time of the violation and sought to seize all plates and materials used in connection with the production of the cover.

The court held that Section 504's purpose requirement (the illustration had to be for philatelic, numismatic, educational, historical, or newsworthy purposes) could not be sustained as a valid time, place, or manner restriction because the regulation discriminated on the basis of content,

which violated the First Amendment because there was no compelling interest served by the discrimination. The Court, did, however, uphold the size and color restrictions as valid time, place and manner regulations which were constitutionally permissible. The color and size restrictions effectively served the Government's compeling interest in preventing counterfeiting and did not discriminate between pubications based on content.

Determining that the purpose restriction unconstitutionally discriminated between publications based on the content and subject matter of the speech, the Court stated:

> A determination concerning the newsworthiness or educational value of a photograph cannot held but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often dependent solely on the nature of the message being conveyed. Regulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment (Citations omitted).

468 U.S. at —, 82 L.Ed.2d at 494.

In *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972), the Supreme Court determined that a Chicago ordinance exempting only peaceful labor picketing from its general prohibition against picketing in particular areas violated petitioner's right to equal protection of the laws under the Fourteenth Amendment because the ordinance made an impermissible distinction between labor picketing and other peaceful picketing.

The ordinance was challenged by Mosely, a federal postal employee, who had for seven months prior to the enactment frequently picketed a Chicago high school for practicing race discrimination. Mosely, who picketed alone, was always peaceful, orderly and quiet. After the ordinance was passed Mosely was told that if his picketing continued he would be arrested, so he brought action challenging the constitutionality of the ordinance.

The Court found that the classification of picketing was formulated in terms of the subject matter, and there was no appropriate governmental interest suitably furthered by the differential treatment. It stated:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. (Citations omitted) . . . Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

408 U.S. at 95-96; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964).

In *Mosely*, the Supreme Court stated:

> [U]nder the Equal Protection Clause, not to mention The First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not pro-

> hibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be justified by reference to content alone.

408 U.S. at 96.

In *Carey v. Brown*, 447 U.S. 455 (1980), the Court invalidated an ordinance which barred all picketing of residences or dwellings, but exempted from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute," on the basis that enforcement of the ordinance violated the Equal Protection rights of members of a civil rights organization who were arrested for picketing on a public sidewalk in front of the mayor's home to protest his failure to support the busing of school children to achieve racial integration.

The appellant in *Carey* attempted to distinguish the ordinance from the one at issue in *Mosely* on the basis that the statute's purpose in *Carey*, to ensure privacy in the home, was a right paramount in the constitutional scheme and more important than the purpose in *Mosely*, which was to maintain quiet and order near schools. The Court did not, however, evaluate whether the State's interest in residential privacy outranked its interest in quiet schools. The Court found that, even given the state's valid interest in residential privacy, "the most legitimate goal may not be advanced in a constitutionally impermissible manner." 447 U.S. at 465. The Court stated that labor picketing was no more deserving of First Amendment protection than public protests over other issues.

In *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court

upheld an ordinance prohibiting the posting of signs on public property. The prohibition contained no exceptions and therefore did not favor one form of speech over another. Supporters for a political candidate contracted with a sign company to fabricate and post signs with the candidate's name on them. The signs were attached to city utility poles in violation of the ordinance, and city employees removed them. The appellees filed suit alleging that the ordinance abridged their freedom of speech. The Court held that the City's interests in limiting visual clutter and in traffic safety were sufficiently substantial to justify the restriction on expression resulting from the prohibition. The Court stated in *dicta* that if there had been any specific exceptions to the ordinance, it may not have been held to be constitutionally permissible. "To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." 466 U.S. at 816. A restriction on speech and the press may be valid where it does not discriminate based on content, and invalid where it is unequally applied based on the content of the speech.

The granting or denial of a tax exemption to a magazine under the "magazine exemption" depends solely on the subject matter contained within the publication. A publication containing only religious articles or sports articles is exempt, while a publication containing the same articles along with other articles of general interest, such as historical and political articles, is not. This type of arbitrary distinction based upon the content of a publication cannot be upheld without proof of a compelling state interest.

Arkansas has no compelling interest in disallowing appellant an exemption for its general interest publication while allowing religious, sports, trade and professional publications an exemption. This type of discrimination is unconstitutional on its face. This discrimination cannot be justified as a reasonable time, place and manner restriction because it is based on the subject matter of the speech. Therefore, the denial of a tax exemption to appellant should be declared unconstitutional as an abridgment of appellant's First Amendment rights to freedom of speech and press.

III. THE APPELLEE'S DENIAL OF A TAX EXEMPTION TO APPELLANT WHICH IS AVAILABLE TO PUBLISHERS OF NEWSPAPERS VIOLATES THE FIRST AMENDMENT.

A. Introduction; Need for Ruling on "Newspaper Exemption."

The application of sales taxes to sales of *Arkansas Times Magazine* is also unconstitutional because sales of newspapers are exempted from taxation under *Ark. Stat. Ann.* § 84-1904(f). The application of sales taxes to sales of magazines and not newspapers discriminates between components of the press based partly on the frequency or format of a publication and partly on the content, abridging the First Amendment rights of freedom of speech and of the press of publishers of magazines. A discrimination of this type could only be justified by a "compelling state interest". There is no rational basis, let alone a compelling state interest, in making a distinction between newspapers and magazines in withholding tax exemptions. Further, the appellee's definition of the

term "newspaper" is unconstitutionally vague. Finally, such a distinction is actually based on the content of a publication and proscribed as discussed in Part II above.

Even if the Court rules that the application of the sales tax to sales of *Arkansas Times Magazine* is unconstitutional because religious, professional, trade and sports journals are exempt, it should also consider and rule upon the discrimination caused by the withholding of a tax exemption from sales of magazines as compared to newspapers. The "magazine exemption" could be construed to apply only to subscription sales. *Arkansas Times Magazine* is also sold in vending machines and at retail stores. All sales of newspapers are exempt, regardless of the method of sale. Thus, recognizing appellant's right to be treated the same as religious, sports, professional and trade journals under the magazine exemption might provide only partial relief, still leaving many sales of *Arkansas Times Magazine* subject to taxation while all sales of newspapers are exempt. In addition, the Arkansas Legislature could, in the future, repeal the magazine exemption, leaving unresolved the question of whether a legislature may discriminate between newspapers and magazines in granting tax exemptions.

B. There is No Meaningful Distinction Between Newspapers and Magazines, and Thus No Rational Basis For Discriminating Between Them.

The appellant has stipulated that *Arkansas Times* is a magazine and not a newspaper. (Joint App. p. 21). However, there is no rational basis for discriminating between newspapers and magazines. They are both instru-

ments of the press; they compete for the same advertising dollars; they are distributed through identical channels, by subscription sales, vending machine sales, and retail store sales; they both contain articles on a variety of newsworthy and interesting topics, photographs, and advertising; they have identical mailing rates; the method of production is similar. Newspapers may be issued daily, weekly, bi-weekly, or less often; magazines are usually issued weekly, bi-weekly, monthly, quarterly, annually, or irregularly. Newspapers are usually printed on newsprint and may be black-ond-white or four-color (the trend is toward four-color). Either type of publication may be small or large in cover size, in number of pages, and in circulation. Either may be bound on one side with staples or other fasteners or may be unbound. Even though it may be possible, in some instances, to point to a publication and with some assurance classify it as a newspaper or a magazine, the distinctions are far fewer than the similarities, and there are some publications which would defy definite classification. As discussed in the next section, any rationale for a distinction would have to be based on a theory that newspapers are entitled to favorable treatment because of their content. Therefore, there is no rational basis for differential treatment of newspapers and magazines which is not constitutionally impermissible.

C. The Definition of "Newspaper" Utilized by the Appellee is Unconstitutionally Vague, and is Based Primarily on Content, Which Violates the First Amendment.

The distinction between newspapers and other publications is unconstitutionally vague. As stated in *Time, Inc. v. Regan*, 539 F. Supp. 1371 (1982), aff'd in part,

Regan v. Time, Inc., 468 U.S. 641 (1984), "the definition of a journal, newspaper, or album is anyone's game to play," 539 F. Supp at 1390.

The definitions of "newspaper", "magazine", "journal", and "publication" (all of which are from *Webster's Third New International Dictionary* (Merriam-Webster, 1979), demonstrate, first, that any distinction between newspapers and magazines is unconstitutionally vague, and second, that it would be based primarily on content.

The primary meaning of "magazine" is "a place where goods or supplies are stored," and it also means the items stored in a magazine. Apparently because it referred to a miscellany of items, the word became applicable to "a periodical that usually contains a miscellaneous collection of articles, stories, poems and pictures and is directed at the general reading public."

"Newspaper" is defined as "a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest."

Then there is that hybrid, the "newsmagazine," defined as "a periodical typically published weekly and devoted chiefly to summarizing and analyzing current news." There is also the "journal," defined as "a: a daily newspaper; b: a periodical publication esp. dealing with matters of current interest . . ."; and the "periodical": a magazine or other publication of which the issues appear at stated or regular intervals—usu. used of a publication appearing more frequently than annually but infrequently used of a newspaper." Thus, a "journal" may be a newspaper or a

"periodical," which seems to be synonymous with "magazine"; a "newsmagazine" is a "periodical," but dealing chiefly with news; and a "newspaper" is a "paper" containing news, articles of opinion, and features. A "magazine" has articles, stories, poems and pictures, but the dictionary is silent as to whether the presence of news, editorials, or advertising in a publication also containing stories, pictures, etc. mandates inclusion under the definition of "newspaper," or whether the presence of stories, pictures, etc. in the object comprised of cheap wood pulp paper covered with black ink appearing on the doorstep every morning would cause that object to be considered a "magazine."

The regulations of the Arkansas Department of Finance and Administration (appearing at T. 48-51) define "newspaper" as "a publication in sheet form containing reports of current events and articles of general interest to the public, published regularly in short intervals such as daily, weekly, or bi-weekly, and intended for general circulation." The term "publication" is defined as "any pamphlet, magazine, journal, or periodical, other than a newspaper, designed for the information and entertainment of the general public or any segment thereof."

What these regulations do is to define "newspaper" in a manner similar to the dictionary definition; and then define "publication" as other printed items which are not "newspapers." The indicia of a "newspaper" are either irrelevant (i.e., it must be in "sheet form," whatever that is), facially vague (i.e., it must be published "regularly" in "short intervals," and "for general circulation," whatever those terms may mean), or based on content ("containing reports of current events and articles of general interest") or readership (the "public" and "general circulation"), both of which, as discussed below and in Parts I and II, are classifications which can only be justified by a compelling state interest.

Under both the dictionary definitions and appellee's regulations, there are two distinctions between newspapers and magazines: frequency of publication and content. The regulations establish another distinction, the type of readership. Frequency of publication alone would not establish a category. Although it would be uncommon for a magazine to be issued daily, or a newspaper monthly, it is common for either to be issued weekly or biweekly. The only distinctions which seem to have any weight are, first, whether a publication deals primarily with current news, and, second, whether the publication has a general circulation. Since *Arkansas Times* meets the "circulation" test, the only distinction between newspapers and magazines such as *Arkansas Times* is based on content. As discussed in Part II, above, such a distinction is impermissible under the First Amendment. There is no reason to favor news over articles on philosophy, politics, art or education, or to favor current news over the reasoned analyses of the news which are more likely to appear in magazines.

D. The Selection of Newspapers and Not Magazines for a Tax Exemption Targets Certain Publications Within the Press for Discriminatory Taxation in Violation of the First Amendment.

Even if there were a basis other than content for distinguishing between newspapers and magazines, and even if the distinction were not unconstitutionally vague, the appellee's discrimination between newspapers and magazines would still violate the First Amendment rights of appellant

because it targets certain publications within the press for taxation, while exempting other publications.

In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983), at issue was a Minnesota use tax imposed on the cost of paper and ink used in producing periodic publications. The first $100,000 of paper and ink consumed in a year was exempt from taxation. The Minnesota Supreme Court upheld the tax, 314 N.W.2d 201 (1981), and this Court reversed. The Court found the tax violated the First Amendment rights of appellant because it singled out the press for special treatment, and because the effect of the exemption was to target only a few of the largest publications to bear the entire burden of the tax.

The Arkansas tax is a general sales tax, applicable to all sales of tangible personal property not exempted under one of the numerous exemptions. Thus, the statute which imposes the tax does not single out the press for special taxation. However, the exemptions target certain elements of the press for favorable treatment, thereby, by omission, targeting other publications for taxation. The effect of exempting newspapers and not magazines is to exempt almost all periodic publications published in Arkansas from taxation, leaving only a very few (and possibly only one, *Arkansas Times*) subject to taxation. Alan Leveritt, the publisher of *Arkansas Times,* stated in the affidavit appearing at p. 13 of the Joint Appendix that he was familiar with magazine publishing in Arkansas and that, to his knowledge, the only magazine in Arkansas which was taxed was *Arkansas Times.* The parties stipulated that if there were other general interest magazines in Arkansas, the Department of Revenue would require them to pay sales tax;

however, there may be only one magazine subject to sales tax.

This Court stated in the *Minneapolis* case:

> [W]e think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. . . . And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises.
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> * * *
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> A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is reversed.

460 U.S. at 592-593.

In *Minneapolis,* the proscribed discrimination was between large and small publications. A similar discrimination was ruled invalid in *Grosjean v. American Press Company,* 297 U.S. 233 (1936). *Grosjean* dealt with a special tax imposed by the Louisiana legislature on advertising receipts of newspapers with a circulation greater than 20,000. The history of the case recited in the Court's opinion indicated that the tax was imposed with a censorial motive, since several of the larger Louisiana newspapers had been critical of Senator Huey Long. The *Minneapolis* decision was not based on *Grosjean* because of this Court's feeling that the *Grosjean* decision depended on the legislature's illicit intent in imposing the tax, and the Court ruled that,

regardless of motive, the discrimination between large and small publications at issue in *Minneapolis* was unconstitutional under the First Amendment.

The instant discrimination is equally unconstitutional, and for the same reasons stated in *Minneapolis*. Just as one cannot divide the general category of "publications" into large and small publications for purposes of discriminating between them, so one cannot divide the category according to frequency of publication, cover size, type of paper, type of binding, or other matters of format, and so discriminate, without violating the rights of the publisher whose publication is accorded the less favorable treatment.

The issue of format-based discrimination was raised in *Regan v. Time, Inc.*, 468 U.S. 641 (1984), the facts of which are described in Part II, Section B. In *Time, Inc.*, the regulation in question prohibited reproduction of U. S. currency except publications for "philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums . . ." 18 U.S.C. § 504(1). The Court struck the "purpose" test as being an unconstitutional content-based discrimination. Time, Inc. also claimed that the requirement that the reproductions be in articles, books, journals, etc. was unconstitutional because it was vague and overbroad. However, this Court declined to rule on that issue because there was no evidence or suggestion that Time, Inc. would have difficulty in meeting that requirement. 468 U.S. at —, 82 L.Ed.2d at 495.

This case, on the contrary, does pose that exact question and is brought by a party directly affected by a format-based distinction. Therefore, appellant asks for a definitive ruling that its First Amendment rights are violated by the

discrimination between magazines and newspapers based on format.

IV. THE STATE COURT SHOULD EXERCISE JURISDICTION OVER CLAIMS BROUGHT UNDER 42 U.S.C. § 1983.

The appellant asserted a cause of action under the Civil Rights Act of 1964, 42 U.S.C. § 1983, which provides a civil remedy to a person who is deprived of civil rights by state action. The appellee deprived appellant of its civil rights by denying it a tax exemption in violation of the First Amendment. Neither the trial court nor the Arkansas Supreme Court ruled on the 42 U.S.C. § 1983 action. The trial court ruled in favor of appellant by construing the magazine exemption to be applicable to all sales of *Arkansas Times*, and, therefore, never reached any of the federal causes of action. The Arkansas Supreme Court reversed the trial court's statutory construction and found that the appellant's First Amendment rights had not been violated. Therefore, it did not consider the 42 U.S.C. § 1983 claim. If this Court finds that appellant's First Amendment rights have been violated, it should also find that appellant's 42 U.S.C. § 1983 claim should be considered.

It is a well-established principle that federal and state courts have concurrent jurisdiction over actions brought under federal statutes unless the federal statutes clearly specify otherwise. The primary question in this regard is not whether a state court *may* exercise jurisdiction, as it definitely may, but whether it *must* exercise jurisdiction.

The general rule seems to be that where state and federal courts have concurrent jurisdiction, state courts may only decline jurisdiction under the doctrine of *forum non conveniens,* and then only when there is a legitimate alternate forum. *Kish v. Wright,* 562 P.2d 625 (Utah 1977).

Furthermore, jurisdiction of state and federal courts over cases arising under federal statutes is considered concurrent unless the federal statute clearly grants exclusive jurisdiction to the federal courts. *Dowd Box v. Courtney,* 368 U.S. 502, 508 (1962). In *Dowd Box,* union officers brought an action against an employer in a Massachusetts state court under the Labor Management Relations Act of 1947. Jurisdiction of the state court was questioned because § 301 of the Act provided that suit under the Act "may" be brought in the U.S. District Courts. The U.S. Supreme Court found that state courts were not divested of jurisdiction by the statute, stating ". . . nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." 368 U.S. at 507-508.

The Court further pointed out at n.4, 368 U.S. at 508, that some federal laws can be enforced only in state courts, as in civil actions under federal laws where the amount in controversy is less than $10,000.

With regard to the Civil Rights Act, 42 U.S.C. § 1983, this Act has a jurisdictional statute, 28 U.S.C. § 1343, providing that U.S. District Courts have original jurisdiction of civil rights actions. The U.S. Supreme Court has made it clear that jurisdiction is not limited to the federal courts,

however. In *Martinez v. California,* 444 U.S. 277 (1980), a suit brought under 42 U.S.C. § 1983, the facts of which are not otherwise relevant, the Court stated at n.7, 444 U.S. at 283:

> We note that the California Courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where
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> > 'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.' (Citations omitted).
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> We have never considered, however, the question whether a state *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not (free to refuse enforcement of the federal claim. [Citation omitted]). But see *Chamberlain v. Brown,* 223 Tenn. 25, 442 S.W. 2d 248 (1969)."

In *Chamberlain v. Brown,* the Tennessee Supreme Court did, indeed, find that the courts of Tennessee did not have jurisdiction over a § 1983 claim. The court stated that "no policy of this state can be found in its history, judicial or otherwise, that would require the judicial branch of the government of Tennessee to entertain such action." 442 S.W.2d at 250-251.

In Arkansas, there is abundant evidence of a policy supporting the exercise of jurisdiction in this case. First, the Act of Admission of Arkansas to the United States dated June 15, 1836 (*Ark. Stat. Ann.* Vol. 1, p. 297), states at § 3: "All the laws of the United States, which are not

locally inapplicable, shall have the same force and effect within the said state of Arkansas as elsewhere within the United States." Second, Ark. Const., Art. 1, §6 provides in part: "The liberty of the press shall ever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. . . ." Third, Ark. Const., Art. 2, §13 provides: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, comformably to the laws."

As stated by Justice Rehnquist in *Sumner v. Mata*, 449 U.S. 539, 549 (1981): "State judges as well as Federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office."

In *Kish v. Wright*, 562 P.2d 625 (Utah 1977), the trial court had refused to exercise jurisdiction over an action brought under 42 U.S.C. §1983 based on the doctrine of *forum non conveniens* and dismissed the case with prejudice. The Supreme Court of Utah first recognized that civil rights actions arising under §1983 could be brought within the state court jurisdiction. The court reversed and remanded the case back to the trial court because the possible effect of the trial court's dismissal with prejudice was to bar the plaintiff from seeking relief in the federal

courts by reason of *res judicata*. The court was obviously concerned that a plaintiff should have a forum within which to assert its claim.

Such a concern could hardly be more relevant than to the instant case. The appellant is precluded from bringing this action in federal district court because of the application of 28 U.S.C. §1341. Section 1341 states "the [United States] district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Appellant's only remaining forum is state court, which should assume jurisdiction over the 42 U.S.C. §1983 action.

Furthermore, it is proper for the state court to use all of the powers available to a federal court in enforcing the action. This includes the power of a district court to award attorneys' fees to the prevailing party pursuant to 42 U.S.C. §1988. Section 1988 provides that a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in actions to enforce §1983.

The United States Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), recognized that §1988 applies to state courts and that a state court may award attorneys' fees to the prevailing party. In *Ramirez v. County of Hudson*, 169 N. J. Super. 455, 404 A.2d 1271 (1979), the defendant's regulation prohibiting employees from disclosing information to newspapers was held to be unconstitutional under the First and Fourteenth Amendments to the Constitution, and attorneys' fees were awarded.

By analogy, *Ramirez* is extremely relevant to the present action. As in *Ramirez,* appellant here is alleging deprivation of freedom of speech under the First and Fourteenth Amendments to the Constitution. As in *Ramirez,* appellant here is maintaining a § 1983 action based on a state action that is in violation of appellant's civil rights. As in *Ramirez,* appellee's actions here are a violation of the First and Fourteenth Amendments to the United States Constitution. Accordingly, appellant should be entitled to attorneys' fees pursuant to § 1988.

In addition, the discretion of a court in awarding attorneys' fees to a prevailing party is narrowly limited. The controlling standard for the awarding of attorneys' fees to the prevailing party under the provision of the Civil Rights Act of 1964 is set forth in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). There the Court stated that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id* at 402. It would be unjust if the appellant were not awarded attorneys' fees, because the State of Arkansas has deprived the appellant of its civil rights and the appellant should not be monetarily penalized for the measures it has taken to correct such deprivation of rights. In summary, the state court should exercise jurisdiction over claims brought under 42 U.S.C. § 1983 and award attorneys' fees to the appellant under 42 U.S.C. § 1988, as well as other damages to which it may be entitled.

CONCLUSION

Accordingly, the appellant respectfully requests that the Court reverse the judgment of the Arkansas Supreme Court and remand this case to the Arkansas Supreme Court for a ruling on appellant's 42 U.S.C. § 1983 claim and for an award of a tax refund.

Respectfully submitted,

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